(1)

No. 87-1648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner,

v.

GENE JETER,

Respondent.

On Writ of Certiorari to the
Superior Court of Pennsylvania

BRIEF FOR THE RESPONDENT

WENDELL G. FREELAND
Counsel of Record
CHERI McCLEAN
FREELAND AND KRONZ
1111 Mercer Building
Pittsburgh, PA 15222
Telephone (412) 471-5267
Counsel for Respondent

QUESTIONS PRESENTED

I. Was the Pennsylvania appellate court correct when it refused to give retroactive application to a Pennsylvania statute to revive a cause of action time-barred by final judgment before the enactment of the statute?

II. Did the six year statute of limitations for paternity claims provide illegitimate children a bona fide opportunity to parental support?

III. Does a six year statute of limitations withstand attack on due process grounds if it provides a reasonable opportunity for instituting a cause of action to establish paternity?

TABLE OF CONTENTS

Table of Authorities

CASES **Page**

FEDERAL STATUTES

UNITED STATES CONSTITUTION

REGULATIONS

STATE STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

On June 11, 1973, Tiffany Clark was born to the petitioner, Cheryl Clark, then twenty-three years old. (Clark) (JA 4 and 5) David Green was listed on the birth certificate as Tiffany's father. (JA 29) In the same year, Clark sought support for herself and Tiffany and advised the Department of Public Welfare of the Commonwealth of Pennsylvania that Green was Tiffany's father. (JA 30)

On September 22, 1983, more than ten years after Tiffany's birth, Clark formally accused Gene Jeter (Jeter) of being the father of Tiffany. (JA 18) When, in 1983, Clark filed her formal Complaint against Jeter, the applicable procedures of the Allegheny County Court of Common Pleas, Family Division, were followed: A counselor scheduled a conciliation conference for October 5, 1983. At that time, in his first opportunity to defend himself, Jeter, without counsel, denied the charges. Because of Jeter's denial of paternity, the counselor scheduled blood tests after which another conciliation conference was scheduled. (JA 4-9) Jeter filed a motion to dismiss and an affidavit in support of the motion. He asserted that the action was filed ten years after the birth of the child and was barred by the then applicable statute of limitations of six years. In the affidavit, he again denied paternity. (JA 10-11)

Clark filed an answer to the motion to dismiss in which she asserted that 42 Pa. C.S.A. §6704(e) was unconstitutional as it violated her and her daughter's rights to "equal protection and due process guaranteed to them by the Fourteenth Amendment of the United States Constitution." (JA 12) (She did not, however, give the appropriate notice of the challenge to the constitutionality of the statute to the Attorney General of the Commonwealth of Pennsylvania as required by Pennsylvania Rule of Civil Procedure 235.) (JA 75) She also claimed that she had not filed a complaint earlier because of her fear of Jeter. (JA 12) This claim, incidentally, was rejected by the trial judge who found that "any fear she may have had of Jeter, even if sufficient to toll the statute, lasted only a few years after [a pre-natal] incident" nine years before her complaint was filed. Clark conceded that her complaint was filed more than six years after the birth of her child and more than two years after the last reported "support" contribution. (Opinion of the Trial Judge, JA 70-71)

The trial judge concluded that the applicable statute of limitations did not violate the constitutional rights of Clark or her child. He properly followed the exposition of the Supreme Court of Pennsylvania in *Astemborski v. Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982). *cert. granted, order vacated and remanded*, 103 S.Ct. 3105 (1983) *order reinstated*, 502 Pa. 409, 466 A.2d 1018 (198[illegible] He dismissed Clark's complaint on July 8, 1985. (JA 72)

Clark appropriately appealed to the Superior Court of Pennsylvania claiming that the ruling by the trial court relying upon the statute of limitations then in effect violated her and her child's rights. While the appeal was pending, the General Assembly of the Commonwealth of Pennsylvania enacted 23 Pa. C.S.A. §4343(b) which provided that "an action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of the birth of the child." (JA 75)

The Superior Court chose to address the issue of the retroactivity of the new eighteen year statute although the issue had not and could not have been raised in the appeal itself. That court concluded that the new statute did not have retroactive application because 1) the Legislature had not "clearly and unambiguously" indicated such an intention; and 2) Clark's cause of action had already been time-barred at least two and one-half years before the effective date (January, 1986) of the new statute. (JA 75-77) The effective date of the new statute is also six months after the final order of the trial court.

Clark preserved her claims in Application for Reargument to the Superior Court and Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The application and petition were denied. (JA 85-86)

This Honorable Court granted certiorari on January 11, 1988.

SUMMARY OF ARGUMENT

I. On October 30, 1985, the Pennsylvania Legislature enacted a statute of limitations that permitted actions to establish paternity to be brought within eighteen years of the birth of a child born out of wedlock. Before then, in July, 1985, the trial court had ruled that the paternity claim here was barred by the statute of limitations in effect when the claim was filed. The Pennsylvania Superior Court considered petitioner's claim that the statute be applied retroactively. It rejected the claim on sound grounds of statutory construction.

Petitioner asks this Court to apply the Pennsylvania statute retroactively because of the federal Child Support Enforcement Amendment of 1984 and the doctrine of federal supremacy. The Pennsylvania statute is valid; it is not in conflict with the federal statute. The supremacy clause is not implicated here. What is involved here, as in other "power of the purse" cases, is the right of the state to receive federal funds.

II. The Pennsylvania six year statute of limitations in effect when this case was filed is not infirm on equal protection grounds. Pennsylvania, unlike some states, did not separate paternity actions from all other actions

brought to vindicate rights of minors. The six year period was not so short that it prevented one from having a bona fide opportunity to bring a claim. Sound practical considerations and state interests underlay this statute. It did not deny to Clark the equal protection of the law.

III. Petitioner claims that the Pennsylvania six year statute of limitations also offends the due process clause. To sustain this claim she must be able to show, in addition to the existence of a cause of action, that the Pennsylvania statute is arbitrary or irrational. This statute, like all statutes of limitations, may terminate the right to litigate a claim. That fact, alone, does not deprive one of property without due process of law. The Pennsylvania statute passes the test of reasonableness.

ARGUMENT

I. THE LOWER COURT PROPERLY REFUSED TO APPLY RETROACTIVELY PENNSYLVANIA'S EIGHTEEN YEAR STATUTE OF LIMITATIONS TO REVIVE A PATERNITY CLAIM TIME-BARRED BY A FINAL JUDGMENT BEFORE THE EIGHTEEN YEAR STATUTE WAS ENACTED.

The Program for Aid to Families of Dependent Children (AFDC), 42 U.S.C. §601 *et seq.*, is one of four major categorical public assistance programs under the Social Security Act of 1935. The other programs are Old Age Assistance (OAA), 42 U.S.C. §301 *et seq.*, Aid to the Blind (AB). 42 U.S.C. §1201 *et seq.* and Aid For the Permanently and Totally Disabled (APTD). 42 U.S.C. §1351 *et seq.* These programs are the cornerstone of government support and assistance to those in need. Changes in the federal laws and in state actions and reactions to those laws have produced litigation requiring analyses of the impact of the federal laws upon the states and the recipients of federal and state aid.

For sound public policy reasons the Congress passed the legislation involved here, the Child Support Enforcement Amendments of 1984, Pub.L. 98-738, 98 Stat. 1305 (1984). (42 U.S.C. §§651 *et seq.*) These amendments express the power of the Congress: in order for a state to receive federal dollars for the state-administered AFDC programs, a state must adopt at least eighteen procedures.[1] Petitioner focuses on one of these procedures: a state must have "procedures which permit the establishment of the paternity of any child[2] at any time prior to such child's eighteenth birthday." 42 U.S.C. §666(a)(5). She insists that the Congress mandated that any state statute of limitations for paternity claims enacted thereafter be applied retroactively.

After final judgment in this case and while Clark's appeal to the

1 42 U.S.C. §666(a)(2), (a)(3). (a)(4). (a)(5). (a)(6). (a)(7), (a)(8). (a)(9), (b)(l), (b)(2). (b)(3), (b)(4). (b)(5). (b)(6), (b)(7), (b)(8), (b)(9) and (b)(lO).

2 "Any child" and the other provisions of Section 666 apply to legitimate and illegitimate children. In the Family Welfare Reform Act of 1987 (H.R. 1720) the relevant language now is: "every child...who is a member of a family receiving aid under the state plan approved under section 402(a)."

Superior Court of Pennsylvania was pending, the General Assembly of Pennsylvania enacted 23 Pa. Cons. Stat. Ann. 4343(b) which provides: that "an action or proceeding...to establish paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child." [Act of October 30, 1985, P.L. 66, Subchapter C §4343(b), effective January 30, 1986.]

Clark asserts that this statute must be applied retroactively whether an earlier action for support had been held by a court to be time-barred, as here, or no action had been brought although an earlier statute of limitations were available. She relies upon cases like *King v. Smith,* 392 U.S. 309 (1968) to support her argument. In that case and in others to which we shall refer, the state statutes or regulations were attacked as being constitutionally infirm. Clark does not attack the Pennsylvania statute on such grounds; rather, she accepts its validity.

It may be helpful to review some of the occasions on which this Court has tested state statutes and regulations attacked for being in violation of the Social Security Act. In *King v. Smith*, 392 U.S. 309, this Court posed the alternatives for the Alabama legislative and executive branches intent on denying support to any child-legitimate or illegitimate-under the euphemistically entitled "substitute father regulation." The choices for Alabama were to reject federal dollars or to change its regulations. This Court advised Alabama:

> Consequently, if Alabama believes it necessary that it be able to disqualify a child on the basis of a man who is not under such a duty to support, its arguments should be addressed to the Congress and not to this Court. *King v. Smith*, 392 U.S. at 332-333.

If this were not clear, Justice Douglas used different words of advice and warning in his concurring opinion:

> "Under the Court's opinion, however, Alabama is free to revive enforcement of its substitute parent regulations at any time it chooses to reject federal funds made available under the Social Security Act."*King v. Smith*, 392 U.S. at 335, n. 3.[3]

A few years later, this Court again rejected state legislative and executive action in conflict with the Social Security Act. *Townsend v. Swank*, 404 U.S. 282 (1971). The Congress provided that children under the age of 21"regularly attending a school, college, or university, or regularly attending a course of vocational or technical training" were "dependents."

Illnois had a definition of its own: college students between the ages of 18 and 20 were not "dependents." This Court held that the Illinois regulation was inconsistent with the requirement "that aid be furnished 'to all eligible individuals.'" *Townsend v. Swank*, 392 U.S. at 287.

Chief Justice Burger concurred only to explicate, as had Justice Douglas in *King v. Smith*, 392 U.S. at 335, the choices available to the several states under Title IV of the Social Security Act:

> [I]t seems appropriate to keep clearly in mind that Title IV of the Social Security Act governs the dispensation of federal funds and that it does no more than that. True, Congress has used the"power of the purse" to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause. The appropriate inquiry in any case should be simply whether the State has indeed adhered to the provisions and is accordingly entitled to utilize federal funds in support of its program.*Townsend v. Swank*, 404 U.S. at 293.

Aid recipients disqualified in Alabama and Illinois attacked the constitutionality of the states' actions as violative of the Supremacy Clause and the Equal Protection Clause. This Court, however, held only that the states had breached the federally imposed obligations under the Social Security Act. The act, including 42 U.S.C. §666, does no more than give state legislatures and agencies the choice

[3] Justice Douglas also stated he would have preferred to reach the constitutional issues raised rather than on the grounds of statutory construction used by the Court.

between federal dollars and federal penalties.[4]

Clark also suggests that although the language of the Act may not mandate retroactive application, a regulation of the Department of Health and Human Services does. The language of the regulation [45 CFR 302.70(a)(5). effective October 1, 1985] is slightly different from the language of the statute. The Secretary writes of procedures for establishing paternity "at least until the child's eighteenth birthday." This language is different from the language of the statute ("prior to...eighteenth birthday"); moreover its simple meaning is in conflict with and is an impermissible expansion of the Congressional meaning: "at least until" is a period of time possibly beyond the eighteenth birthday.[5]

If the Pennsylvania statute is not in conflict with the Congressional act, the next question is whether Pennsylvania courts correctly ruled on the issue of retroactivity. The Pennsylvania Superior Court made clear that the language of the eighteen year statute did not clearly and unambiguously indicate a legislative purpose to have the statute applied retroactively.[6] This Court should find no jurisprudential error there. More compelling in the lower court's holding is its statement that Jeter had raised the shield of the six year statute of limitations, as he was entitled to do, and that there had been a final judgment that Clark's claim was time-barred before the eighteen year statute was enacted.

4 The Social Security Act is, of course, not the only law creating such choices. See, e.g. the action of the Civil Service Commission under the Hatch Act discussed by this Court in State of *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947). The penalty for Oklahoma was the loss of highway funding in an amount equal to two years' salary of an Oklahoma highway official.

5 Legislation proposed in the 100th Congress, the Family WelfareReform Act of 1987 (H.R. 1720), uses the words "prior to" in Section 503(a)(B)(i) in referring to procedures to establish the paternity"...as soon as possible after such child's birth but in any event prior to such child's eighteenth birthday."

6 The Pennsylvania Statutory Construction Act of 1972, 1 Pa. Cons. Stat. Ann. §1926 provides: "No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly."

If this Court were to conclude that Pennsylvania did not follow the procedures under the Act, it may suggest as it did in *Rosado v. Wyman*, 397 U.S. 397 (1970): that the Secretary "afford [Pennsylvania] an opportunity to revise its program in accordance [with the procedures] if the State wishes to do so."

II. THE PENNSYLVANIA SIX YEAR STATUTE OF LIMITATIONS FOR PATERNITY CLAIMS PROVIDED ILLEGITIMATE CHILDREN A BONA FIDE OPPORTUNITY TO OBTAIN PARENTAL SUPPORT.

Clark argues that the six year statute of limitations in effect at the time she filed her charge of paternity against Jeter violates the equal protection clause of the XIVth Amendment. She suggests that any statutory scheme differentiating between legitimate and illegitimate children is constitutionally infirm, either under the XIVth Amendment or under the Vth Amendment *vis `a vis* the Congress.

For the last twenty years, this Court has given regular and consistent attention to the status of illegitimate children. *Levy v. Louisiana*, 391 U.S. 68 (1968) to *Reed v. Campbell*, 476 U.S. 852 (1986). In no case has this Court stated that "the procedures for illegitimate children [must be] coterminous with those accorded legitimate children." *Mills v. Habluetzel*, 456 U.S. 91, 97. In fact, this Court has held otherwise:

> If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock.
>
> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded

legitimate children. *Id.* at 97.

Clark now insists that this Court should adopt as its holding here the concurring opinion of Justice O'Connor in *Mills v. Habluetzel*, 456 U.S. at 102. Justice O'Connor wrote lest the opinion "be misinterpreted as approving the 4-year statute of limitation" approved by Texas pending the appeals in *Mills*. In essence, the reasons underlying that concurring opinion and Clark's position are 1) that a state should not separate paternity cases from all other claims of minors;[7] and 2) that the interest of a state in preventing the prosecution of stale or fraudulent claims is "undercut" by countervailing policy considerations and "substantially alleviated" by human leukocyte antigen (HLA) blood tests.

We shall demonstrate that Pennsylvania did not separate paternity cases from all other claims of minors. The statute under attack here was enacted April 28, 1978. Its effective date, June 27, 1978, is the same effective date for a package of statutes of limitations enacted by the Pennsylvania Legislature. These statutes of limitations for actions by minors were not tolled during minority. 42 Pa. Cons. Stat. Ann. §5533.[8] For example, a baby, who suffered permanent brain damage in an automobile accident, could not institute a lawsuit for life-long damages more than two years after the accident. A later statute, effective in June, 1984, repealed 42 Pa. Cons. Stat. Ann. §5533. The new section 5533 provides that "the period of minority shall not be deemed a portion of the time period within which the action may be commenced." The new statute, we note, was not applied retroactively. *Maycock v. Gravely Corporation*, 352 Pa. Super. 421, 508 A.2d 330 (1986).

In Pennsylvania, therefore, paternity claims were not "one of the few...causes of action not tolled during the minority of the plaintiff." *Mills v. Habluetzel*, 456 U.S. at 104 (O'Connor concurring). In fact,

[7] Justice Powell joined Part I of the concurring opinion emphasizing that "it is significant 'that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff.'" Ibid. at 106.

[8] Seven different periods of limitations were subject to the non-tolling provision. They were periods of six months to fifteen years: 42 Pa. Cons. Stat. Ann. §§ 5522-5528.

when this paternity action was filed in September, 1983, Pennsylvania had no provision for tolling of statutes of limitations during minority except in limited circumstances. At the legally relevant time, Pennsylvania did not separate paternity cases from all other claims of minors.

Clark, probably recognizing that Pennsylvania is unlike Texas which provided for tolling of almost all statutes of limitations during minority, looks to other Pennsylvania statutes including the intestacy laws of Pennsylvania. She points to 20 Pa. Cons. Stat. Ann. §2107(c) which provides: "[f]or purposes of descent by, from and through a person, born out of wedlock, he shall be considered the child of his father." She overlooks two facts: 1) the relevant event is death for which no legislature has been able to create a calendar and which may occur long after minority; and 2) the claim of the child is "subject to such time limitations and to such procedures as are applied to any other heir or claimant...." 20 Pa. Cons. Stat. Ann. §3538. (Claims must be filed "within one year after the first complete advertisement of the grant of letters...or thereafter but prior to...distribution." 20 Pa. Cons. Stat. Ann. §3532.)

Clark also mentions that a putative father in a custody action may seek, at any time, a determination that he is the father of a child. She neglects to point out, however, that a putative father's parental rights may be terminated under 23 Pa. Cons. Stat. Ann. §2511 provided he receives at least ten days notice of the hearing under the involuntary termination statute.

All of the foregoing is written to make clear that at the time this case began Pennsylvania had a hodge-podge of statutes affecting the rights of minors further emphasizing the differences between Pennsylvania and Texas.

The thrust of Clark's attack upon the Pennsylvania statute is that neither Pennsylvania nor any government may make distinctions between legitimate and illegitimate children in matters of support. Such ignores the laws governing support for legitimate and illegitimate children of "an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual." 42 U.S.C. §402(d)(l). The Social Security Act differentiates between legitimate and illegitimate children entitled to support by

its definition of "dependency." A child who "is neither the legitimate nor adopted child" must have been living with or supported by the individual covered under the Act. 42 U.S.C. §402(d)(3).

This classification withstood attack on equal protection grounds under the due process provisions of the Vth Amendment in *Matthews v. Lucas*, 427 U.S. 495 (1976). Since that decision, the Congress revisited Section 402 in 1977, 1980, 1981, 1983, 1984 and 1986. In none of the amendments did Congress change its distinction between legitimate and illegitimate children for the purposes of support.[9]

Disparate treatment for illegitimate children by the Congress may also be found in the Civil Service Retirement Act, 5 U.S.C. §§8301-8348 (specifically, by the definition in §8341); the Federal Employees Health Insurance Act, 5 U.S.C. §§8901-8913 (specifically, by the definition in §8901); and the Federal Survivor Benefit Plan (for the military), 10 U.S.C. §§1447-1455 (specifically, by the definition in §1447).

To date, therefore, neither the Congress nor the courts have required that illegitimate children be accorded all of the benefits and procedures accorded legitimate children.

In the face of an attack upon such a position on equal protection grounds the interest of a government expressed in statutes limiting claims by the passage of time or by the nature of proof required is similar. In both instances, governments raise barriers against claims which may be stale, fraudulent or false. This interest of governments is recognized as valid by Clark. She argues, however, that this interest must be balanced against the countervailing interest of governments in reducing its payments to children who are welfare recipients. It is for the Pennsylvania Legislature and not Clark to use the scales.

When the General Assembly of Pennsylvania enacted the six year statute of limitations it did not do so because of an inordinate desire

[9] Admittedly, most of the amendments did not affect subsection (d), but the 1981 amendments made changes in subsection (d), including (d)(I) by Pub.L. 97-35 §§2203(d)(I), 2210(a)(I), (5)(A).

to protect putative fathers from claims of support. Nor did it act without the knowledge that the support provided for in the statute might replace support from Pennsylvania coffers. The Legislature specifically permitted a complaint to be filed by "any public body or public or private agency having any interest in the care, maintenance or assistance of any person to whom the duty of support is owing." 42 Pa. Cons. Stat. Ann. §6704(b). In addition, payments under an order for support may be transmitted "directly to a public body or public or private agency" which is providing care, maintenance and assistance. 42 Pa. Cons. Stat. Ann §6706(b). In statutes made effective simultaneously with the statutes just mentioned, the Legislature reenacted the "Revised Uniform Reciprocal Enforcement of Support Act (1968)" providing for, *inter alia*, the initiation of proceedings for reimbursement by a state or political sub-division which had furnished support (42 Pa. Cons. Stat. Ann. §6748) and action by the Department of Welfare in pursuing support actions and filing appeals from orders it deemed not to be in the public interest. (42 Pa. Cons. Stat. Ann. §§6757(c) and 6774.)

Clark minimizes the state interest in avoiding stale and fraudulent claims. In so doing, she does not refer to the facts of this case to give meaning to the terms "stale and fraudulent." The broad brush of constitutional argument misses some of the practical considerations present here-and, we suggest, in many of the old cases, stale or not so stale. The reasons for the shield of statutes of limitations are that memories may be faded, witnesses may no longer be available...that defenses that could be raised have disappeared with time. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945). In a paternity case, several defenses may be raised: non-access to the mother, infertility, evidence of intercourse with others, evidence of accusations against another. Eleven years after conception, the difficulties in proving non-access or access of others are obvious. Just as difficult would be trying to determine if the father named on the birth certificate existed in 1973. What, we ask, would happen to Jeter's defense if it were determined that he is infertile *now* and he asserted such? With all the panoply of protections Clark suggests are available to an accused in a paternity case in Pennsylvania, the single, most nearly impenetrable defense is somewhat smashed because of the passage of time.

We suggest also that in this case there may be the stench of false statements. Clark now says that Green is a fictitious name. At least twice she used it, according to her affidavit and her testimony - at birth and shortly after that when she applied for public assistance. (JA 14 and JA 29-30). She did not mention in her affidavit or her testimony that on October 2, 1975 she also named Green as the putative father. (JA 68, Exhibit 5) This Court recognized that the "obstacles" to filing paternity suits soon after the birth of a child are many. Justice Rehnquist (now Chief Justice) listed several in *Mills v. Habluenzel*, 456 U.S. at 109: "financial difficulties," "continuing affection for the child's father, a desire to avoid disapproval..., or the emotional strain and confusion." Justice O'Connor suggested others in *Mills* at 105: unwillingness to jeopardize a continuing relationship with the father, the possibility of the mother's being a minor herself. Clark's dissembling as late as 1975 when she was twenty-six should remove her from this ambit of concern and protection.

In *Pickett v. Brown*, 462 U.S. 1, 15-16, this Court reiterated its rejection in *Mills* of "the argument that recent advances in blood testing negated the State's interest in avoiding the prosecution of stale or fraudulent claims." The tests referred to in *Mills* and *Pickett* (ABO and HLA) are the tests available for review by this Court in this case. The writer Terasaki is an articulate proponent for the efficacy of the HLA tests as proof of non-paternity and paternity. 16 J. Fam. L. 543 (1977-78) We note he is not without his critics. [See, Jaffee, 17 J. Fam. L. 458 (1978-79)] Terasaki himself does not claim that HLA testing can even in one case, with absolute reliability, narrow the field to less than two possible fathers. 16 J. Fam. L. at 548-49, 551-55.[10] New tests referred to by Clark and amici have not been admitted in evidence in any state of the United States and should not affect "the relationship between a statute of limitations and the State's interest in preventing the prosecution of state or fraudulent paternity claims."

The choice for this Court appears to be between finding the Pennsylvania statute one that provides a bona fide opportunity to obtain

[10] The charts in Terasaki's study do not include any of the Negro samples (17% of his 1000 cases). He writes that the data may reveal some comparatively insignificant variations for race. The record shows that Jeter is black. (JA 5) There is nothing in the record about the race of Cherlyn or Tiffany Clark.

parental support or holding that is it unlikely that any statute differentiating between legitimate and illegitimate children will pass constitutional muster. For the philosophical and practical considerations we advanced, we believe this Court should conclude that the Pennsylvania statute did give the parent and the child the opportunity required by law.

III. THE PENNSYLVANIA SIX YEAR STATUTE OF LIMITATIONS FOR INSTITUTING CAUSES OF ACTION TO ESTABLISH PATERNITY WAS NEITHER ARBITRARY NOR IRRATIONAL AND, THEREFORE, DID NOT CONSTITUTE A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In none of the cases in which the Court has examined the status of illegitimate children has the Court resolved the issue before it under the provisions of the Due Process Clause of the XIVth Amendment. Of course, it is fair to note that determinations of constitutional infirmities under the equal protection clause obviated the need for discussion of and decision on the due process question. In some cases, this may be because of the "cryptic and abstract words of the Due Process Clause." *Mullane v. Central Hoover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Justice Jackson continued:

> "[T]here can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." Id.(Emphasis added)

Clark and *amici* contend that the Pennsylvania six year statute of limitations deprives children of a property right without due process of law. A cause of action is a property right. In most instances such an entitlement is created by state law; certainly, that is true here.

In its analyses of cases in which deprivation of such property rights is an issue, the Court developed principles to determine what is "appropriate to the nature of the case." In two cases at the same term, *Ferri v. Ackerman*, 444 U.S. 193 (1979). and *Martinez v. State of California*, 444 U.S. 277 (1980), the Court announced principles pertinent here. In *Ferri*, it made clear that it was state law and not

federal law that created a cause of action for malpractice and that it was state law and not federal law that defined the defenses:

> "...When state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ibid.* at 198.

Similarly, the Court considered the interest of California in immunizing state officials "paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. State of California*, 444 U.S. at 282. This Court did not find that state statute "wholly arbitrary or irrational." The Pennsylvania statute under attack here cannot be considered "wholly arbitrary or irrational." It provided a reasonable opportunity for a cause of action to establish paternity to be instituted.

In *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982), the Court again considered what process is due. In its explication of the powers of a state which do not deprive one of property without due process, it stated:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication be they statutes of limitations, (citations omitted) or, in an appropriate case, filing fees. (citation omitted) And the state certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Ibid*, 437. (Emphasis in the original)

The test to be used in considering the Pennsylvania statute of limitations, therefore, is the test of reasonableness. Clark, however, avoids that test. She argues the Pennsylvania statute should not provide that the cause of action be brought by the custodial parent because the failure of the custodial parent to institute such cause of action precludes the child from pursuing such a claim thereafter. Statutes and rules governing the filing of causes of action by minors or infants uniformly provide that a cause of action shall be brought by a next friend or by a guardian *ad litem*.[11] Unless there is a tolling provision in those jurisdictions, the failure to file the cause of action within the applicable period of limitations deprives the infant forever of the right to institute an action. Again, we note that when this cause of action was filed, Pennsylvania did not provide for tolling during the minority of a child with a cause of action. 42 Pa. Cons. Stat. Ann. §5533.

[11] Pa. Rule of Civil Procedure 2028 uses the term guardian which, by definition in Rule 2026 includes "next friend" and "guardian *ad litem*." Fed. R. Civ. P. 17(c) uses "next friend or guardian *ad litem*." Many states, incidentally, permit one over 14 to seek the appointment of a guardian *ad litem*.

Clark concedes (Petitioner's Brief. 36) that the Pennsylvania statute of limitations is clothed with validity. Indeed, she must do so. "Statutes of limitations...'are found and approved in all systems of enlightened jurisprudence.' (citation omitted)...'The right to be free from claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979). She has not shown that the time allowed for instituting an action to determine paternity deprived her or her child of a meaningful opportunity to litigate the issue. Nor has she shown that requiring the action to be brought by a custodial parent is unreasonable or, indeed, different from the procedures for the vindication of the rights of infants everywhere. The statute, we submit, withstands this constitutional attack.

CONCLUSION

For the reasons discussed, the Pennsylvania six year statute of limitations does not violate equal protection or due process clauses. The new Pennsylvania statute should not be applied retroactively to revive a claim already time-barred by final judgment. The judgments of the Pennsylvania courts should be affirmed.

Respectfully submitted,

Wendell G. Freeland
Craig A. McClean
FREELAND & KRONZ
1111 Manor Building
Pittsburgh, PA. 15219
(412) 471-5287
Counsel for Respondent